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IDAHO PUBLIC UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)	
OF KOOTENAI HEIGHTS WATER)	CASE NO. KHW-W-05-01
SYSTEM, INC. FOR A CERTIFICATE OF)	
PUBLIC CONVENIENCE AND NECESSITY)	COMMISSION STAFF'S
)	MEMORANDUM OF
)	AUTHORITIES RE:
)	JURISDICTION
)	

INTRODUCTION

On October 3, 2006, the Idaho Public Utilities Commission (Commission) granted reconsideration of its final Order No. 30122, which granted Kootenai Heights Water System Inc.'s (Kootenai Heights, Company) request for a Certificate of Public Convenience and Necessity authorizing it to operate as a public utility in the state of Idaho. Order No. 30138. The Commission granted reconsideration based upon the Company's Comments and Objections filed on September 22, 2006, in which the Company objected to the Commission's jurisdiction over it stating that it is not a public utility.

The Commission ordered the Company to file a legal brief or memorandum setting forth the specific grounds as to why it contends it is not a public utility and why the Commission does not have jurisdiction over it, including specific reference to particular provisions of statute, rule, order, notice, case law, or any other controlling law upon which it bases its statements, no later than October 23, 2006. Order No. 30138. The Commission also ordered that Commission

Staff shall be entitled to respond by written legal brief or memorandum to that filed by the Company no later than November 6, 2006. *Id.*

The Company's memorandum was received by the Commission on October 26, 2006, in an envelope postmarked October 24, 2006, which is past the October 23, 2006 deadline. Commission Staff now files this memorandum examining the relevant statutes, case law, and authority demonstrating that the Commission has jurisdiction over the Company under Idaho law, and supporting the Commission's final Order No. 30122 granting the Company a Certificate of Public Convenience and Necessity.

PROCEDURAL HISTORY

On August 22, 2005, Kootenai Heights filed an Application for a Certificate of Public Convenience and Necessity (Certificate) with the Commission. On September 30, 2005, the Commission issued a Notice of Application and Modified Procedure establishing a deadline for written comments of November 10, 2005. Order No. 29877. On November 1, 2005, the parties executed a Stipulation asking the Commission to suspend the written comment deadline so that alternative organizational structures for the Company could be explored. The Commission suspended the comment deadline, and directed the parties to report back to the Commission in 60 days. Order No. 29909.

On January 20, 2006, Commission Staff reported that the Company wished to proceed with its original Application. The Commission issued a Second Notice of Application and Modified Procedure, setting a comment/protest deadline of March 9, 2006. Order No. 29960. Commission Staff conducted a review of the Company's Application and financial information. Staff also conducted an on-site inspection of the system, and was the only party to file comments in this case. Staff recommended that the Company be granted a Certificate of Public Convenience and Necessity. Staff also made several recommendations pertaining to the Company's rates, billing, charges, and customer rules. The Company did not object to the Commission's jurisdiction, the Commission's use of Modified Procedure to process its Application, and did not file any comments or reply despite being offered an extended time period beyond the March 9, 2006, comment deadline in which to do so. *See*, July 11, 2006, letter to Gary A. Finney, attached as exhibit A.

On September 1, 2006, the Commission issued a final order granting the request of Kootenai Heights Water System, Inc. (Kootenai Heights, Company) for a Certificate of Public

Convenience and Necessity. Order No. 30122. The Commission also issued, on September 1, 2006, a Notice of Proposed Order along with a Proposed Order regarding the rates, charges, rules, and regulations of the Company. Procedural Rule 312, IDAPA 31.01.01.312.

On September 22, 2006, Kootenai Heights filed a pleading titled "Comments and Objections to Proposed Order and Request for Evidentiary Hearing" in response to the Notice of Proposed Order. In this pleading the Company objects, for the first time, to the jurisdiction of the Commission and states that the Company is not a public utility. Kootenai Heights' Comments and Objections, p. 1. Based on the Company's objection to the Commission's jurisdiction, the Commission issued Order No. 30138 granting reconsideration of the final order granting the Company a Certificate, Order No. 30122. Reconsideration was granted as to the sole issue of whether Kootenai Heights is a public utility under the jurisdiction of the Commission. The Commission directed the parties to file legal briefs and/or memoranda.

FACTS

Kootenai Heights filed an Application seeking a Certificate of Public Convenience and Necessity from the Commission on August 22, 2005. The Company stated, "Please issue a Certificate of Public and Convenience and Necessity authorizing Kootenai Heights Water System, Inc. to operate as a public utility in the state of Idaho, and to serve the geographical area requested." Kootenai Height's Application, Cover letter, p. 1.

The Company submitted various supplemental documents with its Application including: a map of the proposed service area, a Water Service Agreement and Easement form, documents evidencing the incorporation of the Company, a copy of the contract with its Certified Operator, a copy of a Clarification-Modification of the Plat for Kootenai Heights, and a letter from the Department of Environmental Quality (DEQ) evidencing conditional approval of the as-built plans.

At the time of the Application the water system was currently in service with six residential customers connected to the system. Application at 2. The Company stated that the system will ultimately serve 11 residential customers. *Id.* The requested service area for the water system consists of Lots 7-18 of Kootenai Heights, with the well located on Lot 10. Application at 1. The Company stated that the cost to construct the system was \$83,500 including the value of Lot 10. Application at 2. The average monthly consumption for the entire system is 31,000 gallons, and the Company stated that billing would start on October 1, 2005.

Id. The Application stated that proposed rates and charges, rules and forms are all contained within the Water Service Agreement submitted with the Application. *Id.*

The Water Service Agreement and Easement (WSA, Agreement) states that the system was developed to provide water “to certain Lots in Kootenai Heights and for further development of additional land and lots in the sole discretion of the Water Provider.” WSA at 1. The WSA further provides that each lot shall pay a hook-up fee of \$5,000, and that rates will be \$40 per month up to 10,000 gallons, and \$4 per thousand gallons used over 10,000 gallons per month. WSA at 2. Each customer will be metered, with the cost of the meter and its installation paid by the Company. *Id.* The Agreement states that monthly rates will not be increased for the first five years. WSA at 2-3. Additionally, the Agreement states that monthly bills will not be sent, and the lot owner shall pay the monthly fee on the 1st day of each month. WSA at 3. Billings will be sent to customers twice a year, on or about May 1 and October 1, for the purpose of computing and billing any excess water usage over the allowed 10,000 gallons per month. WSA at 3-4.

ARGUMENT

I. KOOTENAI HEIGHTS WATER SYSTEM INC. IS A PUBLIC UTILITY UNDER IDAHO LAW.

It is undisputed that Kootenai Heights Water owns, controls, operates, and manages a water system for compensation within the state of Idaho. Consequently, the Company is a “water corporation” as that term is defined in *Idaho Code* § 61-125.

The term “water corporation” when used in this act includes every corporation or person, their lessees, trustees, receivers or trustees, appointed by any court whatsoever, owning, controlling, operating or managing any water system for compensation within this state.

Idaho Code § 61-125.

The term “water system” when used in this act includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, controlled, operated or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic or other beneficial use for hire.

Idaho Code § 61-124.

A municipal corporation, mutual nonprofit or cooperative, or any other public utility organized and operated for service at cost and not for profit is not subject to the Commission's jurisdiction. *Idaho Code* § 61-104. Absent one of the above mentioned exceptions, a water corporation is a public utility subject to the jurisdiction, control, and regulation of the Commission where the service is performed and the commodity delivered to the public or some portion thereof. *Idaho Code* § 61-129.

Kootenai Heights is a for-profit general business corporation registered with the Idaho Secretary of State. Kootenai Heights clearly is not a municipal, a cooperative, nor a mutual nonprofit organized and operated at cost and not for profit. *See*, Minutes of the Combined Organizational Meeting of the Board of Directors, Articles of Incorporation, p. 2, (filed with the Company's Application). Its rates, charges, and fees are set forth in its Waster Service Agreement. Consequently, since it cannot be denied that Kootenai Heights owns, controls, operates, and manages a water system for compensation within the state of Idaho, and is a water corporation, the only question remaining is whether its service is performed and its commodity delivered to the public, or some portion of the public.

"The furnishing of water to one person or corporation, under a contract, does not constitute a delivery of water to the public or some portion thereof." *Humbird Lumber Co. v. Pub. Utilities Comm'n of the State of Idaho*, 39 Idaho 505, 228 P. 271, 273 (1924). In *Humbird Lumber* the Lumber Company had constructed and installed complete water systems at its plants for use in its operations and for fire protection. *Id.*, 228 P. at 272. Northern Pacific Railway Company had its own depots, roundhouses, cattle pens, office, etc... adjoining to the plants of the Lumber Company. *Id.* The Railroad had its own water system installed, and received its water from the Sandpoint Water & Light Company, a public utility. *Id.* The Railroad discontinued its service from Sandpoint Water & Light and connected its system with that of the Lumber Company. *Id.* The Lumber Company thereafter supplied the Railroad with water under contract. *Id.* It was stipulated that the Lumber Company never furnished water to any other person, company, or corporation, did not intend to engage in the utility business, and did not offer to and did not intend to offer to engage in the utility business in any manner whatsoever. *Id.* The Court concluded that: 1) the evidence did not justify the conclusion that the lumber company was "operating" its water system "for compensation" because the primary purpose was

always to provide fire protection for its sawmills, and the supply to the Railroad was incidental to that primary purpose; and 2) furnishing water to one person or corporation, under contract, does not constitute a delivery of water to the public or some portion thereof. *Id.*, 228 P. at 272-73.

Similarly, in *Stoehr v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921), it was stipulated that:

The said hot water was not developed and acquired for the purpose of sale to the general public, and neither the Natatorium Company nor any of its predecessors in interest have ever held it open to use or purchase by the general public but at all times since its original discovery it was, and now is, intended for use primarily for the said natatorium for sanitary and bathing purposes.

The primary purpose of the Natatorium's water was to supply itself with natural hot springs water for bathing and sanitary service, and similar to that in *Humbird Lumber* was never intended or held out to be a utility. The people who received hot water at their homes for heating did not rely upon the Natatorium's service for potable, drinking water.

In the present matter, Kootenai Heights and its relationship to its customers is much different than that presented in *Humbird* or in *Natatorium*. Here, Kootenai Heights Water was specifically created, organized, incorporated, and managed to provide potable water to customers in a specific geographic region, that have no other viable option for obtaining this service. The Company always intended itself to offer a public utility service – providing water – to residents in the Kootenai Heights subdivision. The Company filed an Application with the Idaho Public Utilities Commission asking that it be granted a Certificate of Public Convenience and Necessity to operate as a public utility in its specified geographic region. The Company stated with its Application, "Please issue a Certificate of Public and Convenience and Necessity authorizing Kootenai Heights Water System, Inc. to operate as a public utility in the state of Idaho, and to serve the geographical area requested." Kootenai Height's Application, Cover letter, p. 1. Additionally, the Company states in its Water Service Agreement (WSA) that the system was developed to provide water "to certain Lots in Kootenai Heights and for further development of additional land and lots in the sole discretion of the Water Provider." WSA at 1. The owners of the Company indicated to Staff that they own additional property adjacent to the service area and are considering combining/extending the water system to serve the additional development. The

customers are individually metered. WSA at 2. The WSA further states that each customer will receive a monthly charge for water service, and must pay a hook-up fee. Clearly, the Company intended itself to operate as a utility and holds itself out as such.

Here we have a true “monopoly” type of situation. The customers of Kootenai Heights Water had and have no choice other than to receive water from the Company if they want to have running, potable water at their new homes. The Department of Water Resources would not allow individual wells, nor would they allow an arrangement where every two lots shared a well. Kootenai Heights Water – Memorandum at p. 3-4. Additionally the City of Sandpoint, which provides water service to other areas of the Kootenai Heights subdivision refuses to extend its service to these lots. Comments and Objections at p. 2. Customers have no say or input into what rates they are charged or how the company is managed or operated. *See*, Water Service Agreement. Public policy requires that the Commission regulate companies where their relationship with customers is such as that existing here.

Despite the fact that the Commission, in Order No. 30138, directed the Company to file a legal brief or memorandum setting forth the specific grounds as to why it contends it is not a public utility and why the Commission does not have jurisdiction over it, including specific reference to particular provisions of statute, rule, order, notice, case law, or any other controlling law upon which it bases its statements, the Company has failed to include a single citation to any authority what-so-ever to support its position. In fact there is only one citation to any authority at all in both of the pleadings filed by the Company objecting to the Commission’s Jurisdiction. That one citation is merely a passing reference stating, “Idaho Code § 61-129 [Public Utility] has no application.” Kootenai Heights Water – Memorandum at p. 4.

Kootenai Heights is a for-profit general business corporation, organized and incorporated for the purpose of providing potable water, utility service to customers in the Kootenai Heights Subdivision that were not allowed to take service from the City of Sandpoint, nor from their own wells. The Company owns, controls, operates, and manages a water system for compensation within the state of Idaho. It is a water corporation that provides service and a commodity to the public, or that portion of the public that resides in the designated service area of Kootenai Heights subdivision. The Company is a public utility under Idaho Law and as such falls under the regulatory jurisdiction of the Idaho Public Utilities Commission.

II. PRIVATE CONTRACTS BETWEEN THE UTILITY AND ITS CUSTOMERS

The Company alleges that, “The Commission has no jurisdiction to interfere or create ‘beaches’ [sic] of the contract.” Kootenai Heights Water – Memorandum at p. 5. The Company also stated, “The Company enjoys the constitutional right of freedom of private contract. For the Commission to change the Contract, it would create a breach of contract with potential damages resulting.” Comments and Objections to Proposed Order, at p. 2.

“Private contracts with utilities are regarded as entered into subject to reserved authority of the state to modify the contract in the public interest.” *Agricultural Products Corporation v. Utah Power & Light Co.*, 98 Idaho 23, 29, 557 P.2d 617, 623 (1976). In fact a Public Utilities Commission may annul, supersede, or abrogate a contract and/or contractual rates between utilities and their customers if doing so is found to be in the public interest. *Id.* This matter, however, is not relevant to the issue of the Commission’s jurisdiction and the issuance of a Certificate to Kootenai Heights Water. It is relevant to the Commission’s Proposed Order regarding the proper rates, charges, rules, and regulations of the Company.

III. DUE PROCESS

The Company alleges that there has been no evidentiary proceeding, and that there is, “no record below, no notice, and no reasonable opportunity to examine, cross-examine, or contest. . . . In short, ‘due process’ is lacking.” Kootenai Heights Water – Memorandum at p. 1-2. Additionally, the Company states, in the last two sentences of its Memorandum, “The Company only applied to the Commission because the Idaho Department of Water Resources said it was required which was probably incorrect. In hindsight, the ‘Application’ is WITHDRAWN.” *Id.*, at p. 5.

Despite what the Company contends, a record does exist in this case. The first document contained in the Commission’s record is the Company’s Application, along with the numerous documents and attachments that the Company submitted with its Application including: a map of the proposed service area, a Water Service Agreement and Easement form, documents evidencing the incorporation of the Company, a copy of the contract with its Certified Operator, a copy of a Clarification-Modification of the Plat for Kootenai Heights, and a letter from the Department of Environmental Quality (DEQ) evidencing conditional approval of the as-

built plans. The record also contains the comments filed by Commission Staff on March 9, 2006, the comment/protest deadline from the Second Notice of Application and Modified Procedure, Order No. 29960.

The Company, despite what appears at the end of its Memorandum, has not withdrawn its Application. "A party desiring to withdraw a pleading must file a notice of withdrawal of the pleading with the Commission and serve all parties with it." Rule 68; IDAPA 31.01.01.068. The Company never filed a notice of withdrawal of pleading.

The Company was afforded ample notice and opportunity to submit evidence before the commission, to file any objections and/or protests to the Commission's actions, to request a formal hearing, and to otherwise be heard fully in this matter. The Commission issued an official Notice of the Company's Application, not once, but twice. Order No. 29877 and Order No. 29960. Along with each Notice of Application, the Commission issued a Notice of Modified Procedure and commenced a comment/protest period that extended, in the case of the Second Notice, from January 27, 2006, to March 9, 2006. The Commission's Notice clearly sets forth the procedure on Modified Procedure, including citation to and explanation of each provision of Modified Procedure. *See*, Order No. 29877 and No. 29960; IDAPA 31.01.01.201-204. Kootenai Heights did not file a protest to the Commission's use of Modified Procedure. The Company did not request a hearing. The Company did not submit any comments or additional evidence. The Company did nothing. *See*, July 11, 2006, letter to Gary A. Finney, attached as exhibit A. After an extended period of time, even past the official comment/protest deadline, the Commission, pursuant to its rules of procedure, considered the matter and issued Final Order No. 30122 granting the Company's request for a Certificate, as well as a Notice of Proposed Order and a Proposed Order regarding the rates, charges, rules, and regulations of the Company.

The Company has been afforded ample notice and opportunity to be heard - due process. Unfortunately the Company choose, for whatever reason, not to file comments, protests, objections, or anything until after all deadlines had passed, and the Commission had ruled upon its Application. The Commission, by issuing its Order regarding rates, charges, rules, and regulations in the form of a Proposed Order and by granting reconsideration of its Final Order No. 30122 has extended an even greater level of due process than that which the Company was entitled to.

CONCLUSION

As demonstrated from review of the Company's Application and pleadings including: the map of the proposed service area, the Water Service Agreement and Easement form, the documents evidencing the incorporation of the Company, the copy of the contract with its Certified Operator, the copy of a Clarification-Modification of the Plat for Kootenai Heights, the letter from the Department of Environmental Quality (DEQ) evidencing conditional approval of the as-built plans, the statements made by the Company in the cover letter of its Application, its Water Service Agreement, its Objection, and its Memorandum, as well as the investigation of Commission Staff, it is clear that Kootenai Heights Water System, Inc. is a water corporation that owns, controls, operates, and manages a water system for compensation within the state of Idaho. It sells water to the public, or some portion thereof, for compensation. Kootenai Heights Water System, Inc. is a public utility.

The Commission, on reconsideration, should affirm its previous Order No. 30122 finding that Kootenai Heights is a public utility under Idaho Law, and granting it a Certificate of Public Convenience and Necessity.

Additionally, Staff recommends that the Commission direct the parties to hold an informal pre-hearing scheduling conference where the parties can discuss the remaining issues relating to rates, charges, rules, regulations, etc... and possibly reach agreement. If the parties cannot resolve the remaining issues, then they can submit a proposed schedule for the submission of pre-filed direct testimony, rebuttal, and an evidentiary hearing.

Respectfully Submitted this 6th day of November 2006.



DONOVAN E. WALKER
Deputy Attorney General

EXHIBIT “A”



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

July 11, 2006

Gary A. Finney
Finney Finney & Finney, P.A.
Old Power House Building
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864

**Re: Kootenai Heights Water System, Inc.
Case No. KHW-W-05-1**

Dear Mr. Finney:

As you are aware, on August 11, 2005, you filed an Application for a Certificate of Public Convenience and Necessity to Operate a Water Utility on behalf of Kootenai Heights Water System, Inc. (Company). That Application was initially noticed for Modified Procedure pursuant to the Commission's Rules of Procedure. IDAPA 31.01.01.201-204. Order No. 29877. The initial deadline for filing written comments or protests was November 10, 2005. In a Joint Stipulation filed with the Commission on November 2, 2005, we asked the Commission to suspend the November 10 comment deadline so that alternative organizational structures for the Company could be explored. The parties were to report the status of this matter to the Commission within 60 days. Order No. 29909. On January 20, 2006, Commission Staff reported that the Company wished to proceed with its original Application. Consequently, the Commission issued the Second Notice of Application and Modified Procedure with a March 9, 2006 comment/protest deadline. Order No. 29960.

Commission Staff filed comments setting forth its recommendations to the Commission on March 9, 2006. Staff was the only party to file comments for this matter. Even though there are no provisions in the Commission's Rules of Procedure for reply comments under Modified Procedure, I contacted you by phone regarding whether you wished to submit any reply comments. You expressed your general dissatisfaction and disagreement with Staff's comments and said you would like to respond. We agreed that you would file your reply by the end of March, approximately three weeks later. I again contacted you on March 30, 2006, inquiring about the status of your reply comments. You indicated that the comments were prepared and would be filed. You also inquired about the possibility of a conference with Staff.

Gary A. Finney
July 11, 2006
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The Commission has not received any comments from you or your client, and it is now four months since the comment deadline has passed. I remain willing to schedule a conference, and given the distance between our offices, a phone conference would be most practical. Please contact me at your earliest convenience if it is your desire to schedule a conference. It has been nearly one year since the Application was initially filed with the Commission, and this matter needs to be resolved.

If you wish to file reply comments, please have them filed with the Commission Secretary no later than July 28, 2006. After this date, the matter will be submitted to the Commission for a final decision regarding the Application, unless some other agreement is reached prior to that date with Staff.

Comments may be mailed to:

Commission Secretary
Idaho Public Utilities Commission
PO Box 83720
Boise, ID 83720-0074

Street Address for Express mail:
472 W. Washington Street
Boise, ID 83702-5983

I thank you in advance for your attention to this matter, and look forward to hearing back from you.

Sincerely,



Donovan E. Walker
Deputy Attorney General

L:KHW0501_Finney_dw

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 6th DAY OF NOVEMBER 2006, SERVED THE FOREGOING **COMMISSION STAFF'S MEMORANDUM OF AUTHORITIES RE: JURISDICTION**, IN CASE NO. KHW-W-05-01, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

FLOYD N McGREE PRESIDENT
KOOTENAI HEIGHTS WATER SYSTEM
INC.
PO BOX 1925
SANDPOINT ID 83864

GARY A FINNEY
FINNEY FINNEY & FINNEY PA
120 E LAKE ST SUITE 317
SANDPOINT ID 83864



SECRETARY